



April 16, 2001

Ms. Cynthia B. Garcia  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2001-1495

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146021.

The City of Fort Worth (the "city") received a request for the documents leading up to the issuance of a letter from Jim Tidwell of the Fort Worth Fire Department to Ron Cherry of Loutex, L.P. and any documents that have been drafted thereafter. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

First, we address the requestor's letter to this office dated February 12, 2001. In this letter, the requestor contends that the city failed to submit its request for a decision to this office within ten business days of its receipt of his written request for information. The requestor asserts that, as a result of this failure, the requested information is presumed public and must be released unless there is a compelling reason for withholding it.

Section 552.301(b) of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The city received the written request for information on January 23, 2001. Thus, the deadline for the city to

---

<sup>1</sup> As you did not submit to this office written comments stating the reasons why sections 552.107 and 552.111 would allow the information to be withheld, we find that you have waived these exceptions. *See* Gov't Code §§ 552.301, .302.

submit a request for a decision to this office was February 6, 2001. Although the city's letter requesting a decision is dated June 13, 2000, our records indicate that the letter was postmarked February 6, 2001. Therefore, we conclude that the city met its ten-day deadline for requesting a decision from this office.

We now turn to your claimed exception. You contend that the submitted information in Exhibit C is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have provided a copy of the first amended original petition in a suit filed by Reatta Restaurant ("Reatta") against Loutex, L.P. ("Loutex") after Loutex chose to close the Bank One Tower, which it owns, and in which Reatta has a restaurant. The city, however, is not

a party to this lawsuit. You state that, as a result of tornado damage to the building, the city has told Loutex to either repair or close the Bank One Tower. You further state that "the City believes that Reatta will try to get an injunction against the city to stop the city from closing" the building. You have not, however, provided any concrete evidence that Reatta intends to sue or seek an injunction against the city. Your belief that Reatta might take such action is not sufficient to establish anticipated litigation under section 552.103.

However, you also state that "the city may file its own lawsuit against Loutex if after inspection there are any fire code violations that Loutex allowed to remain." Moreover, you state that the submitted information relates to a city investigation into possible violations by Loutex of the city's fire code for which litigation with Loutex is anticipated. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation with Loutex is reasonably anticipated under section 552.103 and that the submitted information relates to the anticipated litigation. Therefore, the city may withhold the submitted information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). A review of the submitted information indicates that Loutex may have already seen some of the information the city seeks to withhold. Any such information already seen by Loutex may not be withheld under section 552.103 and must be disclosed to the requestor. In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, we note that some of the submitted materials are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/tr

Ref: ID# 146021

Encl: Submitted documents

cc: Mr. Roland K. Johnson  
Harris, Finley & Bogle  
Attorneys at Law  
777 Main Street, Suite 3600  
Fort Worth, Texas 76102-5341  
(w/ø enclosures)